

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN 29 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0102-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
DAVID GLENN MILLS,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR050324

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

David Glenn Mills

Florence
In Propria Persona

K E L L Y, Judge.

¶1 In 1996, petitioner David G. Mills pleaded guilty and was convicted of three counts of sexual exploitation of a minor under the age of eighteen. The trial court

sentenced him to a partially aggravated prison term of eight years on one count and to consecutive, presumptive terms of five years on each of the remaining counts.

¶2 In this petition, Mills seeks review of the trial court’s denial of his most recent request for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P.¹ We will not disturb that ruling unless the court has abused its discretion. *See State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶3 In his petition for post-conviction relief below, Mills argued (1) the trial court did not set forth any findings in aggravation at sentencing, notwithstanding the requirement that he do so pursuant to 1993 Ariz. Sess. Laws, ch. 255, § 11 (former A.R.S. § 13-702(B)) and *State v. Harrison*, 195 Ariz. 1, ¶¶ 15-17, 985 P.2d 486, 490 (1999); (2) to the extent the court had relied solely on the “catch-all aggravator,” rather than an aggravating circumstance specifically enumerated by statute, *see* 1993 Ariz. Sess. Laws, ch. 255, § 11 (former § 13-702(C)), his aggravated sentence violated due process under the rule announced in *State v. Schmidt*, 220 Ariz. 563, ¶¶ 10, 12, 208 P.3d 214, 217 (2009); (3) his of-right Rule 32 counsel rendered ineffective assistance because he failed to challenge the aggravated sentence on the ground set forth in *Schmidt*. He asked the court to vacate the aggravated sentence and resentence him to a presumptive term.

¹This is a successive Rule 32 proceeding. *See* Ariz. R. Crim. P. 32.2(b); *State v. Mills*, No. 2 CA-CR 2008-0200-PR (decision order filed Nov. 25, 2008); *State v. Mills*, No. 2 CA-CR 2005-0045-PR (decision order filed Sept. 15, 2005); *State v. Mills*, No. 2 CA-CR 2002-0281-PR (memorandum decision filed Nov. 26, 2003); *State v. Mills*, No. 2 CA-CR 01-0147-PR (memorandum decision filed Aug. 23, 2001); *State v. Mills*, Nos. 2 CA-CR 96-0726-PR, 2 CA-CR 96-0727-PR (consolidated) (memorandum decision filed Nov. 12, 1997).

¶4 The trial court appears to have held an informal conference, pursuant to Rule 32.7, to discuss Mills’s claims. At the conclusion of the conference, the court found there was no basis for the relief Mills had requested and denied his petition. This petition for review followed.

¶5 On review of the trial court’s decision, Mills argues that it abused its discretion in denying the post-conviction relief he requested because (1) the state had “confessed error” by failing to file a response to his petition, and (2) he had stated a colorable claim for relief under *Schmidt*. We review the court’s ruling for an abuse of discretion. *Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d at 67.

¶6 First, we reject Mills’s argument that the trial court was required to grant relief because the state failed to respond to his petition. A trial court does not abuse its discretion when it summarily denies relief under Rule 32.6(c) “without awaiting the State’s response.” *State v. Curtis*, 185 Ariz. 112, 114, 912 P.2d 1341, 1343 (App. 1995), *disapproved on other grounds by Stewart v. Smith*, 202 Ariz. 446, ¶ 10, 46 P.3d 1067, 1071 (2002).

¶7 As Mills now appears to recognize, the trial court did identify its reasons for imposing an aggravated sentence, having stated at sentencing that the partially aggravated term was based on “the threat the defendant poses to children.” Mills argues on review that his claim for relief was nonetheless colorable because this aggravating circumstance was not enumerated by statute. *See* 1993 Ariz. Sess. Laws, ch. 255, § 11 (former § 13-702(C)); *Schmidt*, 220 Ariz. 563, ¶¶ 10, 12, 208 P.3d at 217 (court may not increase sentence beyond presumptive term based solely upon “catch-all aggravator”).

¶8 Although Mills has not identified any provision in Rule 32 that authorizes the relief he seeks, we understand his claim as one raised under Rule 32.1(g), which provides, as a ground for post-conviction relief: “There has been a significant change in the law that if determined to apply to defendant’s case would probably overturn the defendant’s conviction or sentence.”² But assuming, without deciding, that *Schmidt* may be characterized as a significant change in the law, Mills is entitled to Rule 32 relief only if *Schmidt*’s holding is applicable to his sentence, which became final many years ago. See Ariz. R. Crim. P. 32.1(g); *State v. Towery*, 204 Ariz. 386, ¶ 8, 64 P.3d 828, 831-32 (2003) (case final when judgment of conviction rendered, appeal exhausted, and time for filing petition for certiorari to Supreme Court passed or certiorari denied); *State v. Ward*, 211 Ariz. 158, ¶¶ 9-10, 118 P.3d 1122, 1126 (App. 2005) (pleading defendant’s of-right Rule 32 proceeding functional equivalent of direct appeal for purpose of finality).

¶9 As our supreme court has explained, “New constitutional rules apply to cases on direct review,” but “[t]he Constitution . . . neither forbids nor demands retroactive application of new rules to cases that have become final. Generally, . . . new constitutional rules do not apply retroactively.” *Towery*, 204 Ariz. 386, ¶ 6, 64 P.3d at 831 (citations omitted).

¶10 Mills presented no argument in his petition for post-conviction relief or his petition for review regarding retroactive application of *Schmidt* to the sentencing decision in his case, made over a decade ago and long since final. Because the applicability of a

²This ground for relief is not subject to preclusion under Rule 32.2(a). See Ariz. R. Crim. P. 32.2(b) (exceptions to preclusion).

significant change in the law is a prerequisite for relief pursuant to Rule 32.1(g), we cannot say the trial court abused its discretion in denying relief. *Cf. State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (finding argument waived on appeal when defendant “d[id] not argue the alleged error was fundamental”).

¶11 For the foregoing reasons, although we grant review, we deny relief.

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge